No. 88-846 (2)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GERALD M. SPARKS - - - - Petitioner

versus

CHARACTER AND FITNESS COMMITTEE OF KENTUCKY,
JUNIUS J. BEAVER, JR.,
THOMAS P. BELL,
GRANT M. HELMAN,
WILLIAM J. BAIRD, III,
STUART E. LAMPE,
PAT GILL - - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED FOR REVIEW

1. Should this Court grant a writ of certiorari to review the granting of immunity to the Kentucky Supreme Court's Committee on Character and Fitness (hereinafter "the Committee"), one member of the Kentucky Supreme Court's Board of Bar Examiners (hereinafter "the Board"), and four members and an employee[1] of the Committee from the claims of Gerald Sparks (hereinafter "Sparks") for monetary damages under 42 U.S.C. § 1983?

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[1]The Chief Justice of the Kentucky Supreme Court was originally a defendant and an appellee, but was dismissed on Sparks' motion. Also, Rosemary Puckett was originally a named defendant and a named appellee, but has been dropped as a party in this Court. All other parties below are named in the caption of this brief and are hereinafter called "Respondents."

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No. 88-846

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GERALD M. SPARKS - - - - *Petitioner*

v.

CHARACTER AND FITNESS COMMITTEE OF KENTUCKY,
JUNIUS J. BEAVER, JR.,
THOMAS P. BELL,
GRANT M. HELMAN,
WILLIAM J. BAIRD, III,
STUART E. LAMPE,
PAT GILL - - - - - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

1. *Sparks* v. *Character and Fitness Committee of Kentucky,* 859 F. 2d 428 (6th Cir. 1988) (Opinion reconsidering prior decision in light of *Forrester* v. *White,* 484 U.S. —, 98 L. Ed. 2d 555 (1988) and affirming the district court judgment) (Appendix hereto, 1a-13a).

2. *Sparks* v. *Character and Fitness Committee of Kentucky,* No. 85-5629 (6th Cir. July 16, 1987) (Order denying Sparks' petition for a rehearing en banc). (Petitioner's Appendix B).

3. *Sparks* v. *Character and Fitness Committee of Kentucky,* 818 F. 2d 541 (6th Cir. 1987) (Opinion affirming the district court judgment). (Petitioner's Appendix A).

4. *Sparks* v. *Character and Fitness Committee of Kentucky,* No. 85-209 (W.D. Ky. June 25, 1985) (Order and Memorandum Opinion). (Appendix hereto, 13a-17a).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

After reconsidering its prior decision in light of *Forrester* v. *White,* 484 U.S. —, 98 L. Ed. 2d 555 (1988), as directed by this Court in *Sparks* v. *Character and Fitness Committee of Kentucky,* 108 S. Ct. 744 (1988), the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") again affirmed the district court judgment on October 18, 1988. Sparks had ninety days from the Sixth Circuit's Opinion to file his petition for writ of certiorari (hereinafter "Petition"). 28 U.S.C. § 2101(c). Sparks' Petition was docketed on November 10, 1988. This Court has jurisdiction to entertain the Petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES

Statute:

42 U.S.C. § 1983

United States Supreme Court Rules:

17.1, 17.1(a), 17.1(c)

(All are quoted in the Appendix hereto.)

STATEMENT OF THE CASE

Sparks filed a complaint in the United States District Court for the Western District of Kentucky (hereinafter "the district court") seeking monetary damages under 42 U.S.C. § 1983 from the Chief Justice of the Kentucky Supreme Court, a member of the Board (Stuart E. Lampe), the Committee, three members of the Committee (Thomas P. Bell, Grant M. Helman, and William J. Baird, III), an associate member of the Committee (Junius J. Beaver, Jr.), and two employees of the Committee (Pat Gill and Rosemary Puckett). Sparks claimed that the Respondents violated his constitutional procedural and substantive due process rights, equal protection rights, and Eighth Amendments rights.[2] The only remedy sought for those alleged violations was compensatory damages of $120,000.00, punitive damages of $500,000.00, attorney's fees, and court costs.

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[2]Because the district court dismissed Sparks' action on Respondents' motion to dismiss for failure to state a claim, the averments in the complaint are referred to as "facts" for purposes of this proceeding — even though Respondents take strong issue with many of those averments.

Sparks averred that he was interviewed by Junius J. Beaver, Jr. before he first took the bar examination. After that interview, Mr. Beaver sent a letter to the Board stating that Sparks was not qualified to take the bar examination because he did not have the requisite moral character. Sparks further averred that he then took the Kentucky bar exam four times. He failed three times, and the fourth time, his examination was not graded. Finally, Sparks averred that he was never given a due process hearing concerning his moral fitness to practice law.

The district court dismissed Sparks' complaint, holding that Respondents were entitled to quasi-judicial immunity because, under the Kentucky Constitution and applicable case law, they are integral parts of the judicial process. The Sixth Circuit affirmed. This Court granted certiorari, vacated the judgment and remanded the case to the Sixth Circuit for further consideration in light of *Forrester* v. *White,* 484 U.S. —, 108 S. Ct. 538 (1988). The Sixth Circuit reconsidered its decision in light of *Forrester* and wrote another opinion affirming the district court's dismissal of Sparks' complaint.

SUMMARY OF ARGUMENT

Sparks' Petition for Certiorari should be denied because there are no "special and important reasons" for granting it. The Sixth Circuit has carefully reconsidered its decision with specific reference to the holding of *Forrester* v. *White,* 484 U.S. —, 98 L. Ed. 2d

555 (1988), and once again affirmed the decision of the district court granting the Respondents quasi-judicial immunity. In considering the application of Sparks for admission to the bar, the Respondents performed judicial acts, as designees of the Kentucky Supreme Court. Thus, the Respondents are properly entitled to quasi-judicial immunity, and Sparks' Petition should be denied.

ARGUMENT

There are No Special Reasons for Granting Sparks' Petition to Review the Grant of Quasi-Judicial Immunity to the Respondents.

United States Supreme Court Rule (hereinafter "USSCR") 17.1 provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." Sparks has given no such special and important reason to justify the granting of the Petition.

First, the Sixth Circuit's decision does not conflict with any of this Court's precedents. See, USSCR 17.1(c). Previously, this Court vacated the Sixth Circuit's original judgment and remanded the case to the Sixth Circuit for reconsideration in light of *Forrester* v. *White,* 484 U.S. —, 98 L. Ed. 2d 555 (1988). In a thorough opinion, *Sparks* v. *Character and Fitness Committee,* 859 F. 2d 428 (1988), the Sixth Circuit reconsidered its decision in light of *Forrester,* clearly distinguished the facts of *Forrester* from the facts of the present case, and, applying the law of *Forrester* to the present case, again affirmed the grant

of quasi-judicial immunity to the Respondents. Respondents adopt *in toto* the Sixth Circuit opinion.[3] As this Court ruled in *Forrester,* 98 L. Ed. 2d at 565, employment functions are not entitled to judicial immunity. But, unlike the hiring and firing of support personnel, the process of determining the admission—or denial—of persons to the practice of law (the basis for the complaint against the Respondents) is clearly a judicial function. The Respondents' performance of a judicial function is entitled to immunity. *Forrester* not only is consistent with the Sixth Circuit's opinion, it *supports* that opinion, as shown by the Sixth Circuit's analysis.

Second, on the issue presented, there is no conflict among the federal courts of appeal. See USSCR 17.1(a). The federal courts of appeal have consistently applied the principles of quasi-judicial immunity which have been adopted by this Court. The federal courts of appeal have ruled that bar examiners, committees on unauthorized practice of law, and bar associations *are* entitled to quasi-judicial immunity for their acts in regulating the practice of law. *Childs* v. *Reynoldson,* 777 F. 2d 1305 (8th Cir. 1985) (members of the board of bar examiners); *Simons* v. *Bellinger,* 643 F. 2d 774 (D.C. Cir. 1980) (in determining what constitutes the unauthorized practice of law, members of the committee on the unauthorized practice of law

[3]For the convenience of the Court, a copy of the Sixth Circuit opinion is included as Appendix A. The constitutional provisions, statutes, and rules relied upon by the Sixth Circuit are set forth verbatim in the Appendix.

performed judicial acts for which they had judicial immunity); *Clark* v. *State of Washington*, 366 F. 2d 678, 681 (9th Cir. 1966) (state bar association had immunity for disbarring an attorney).

Third, neither the Sixth Circuit nor the trial court departed from the usual course of judicial proceedings. See USSCR 17.1(a). Sparks has not claimed any such departure and, indeed, there is none.

Fourth, there are not important federal questions that have not yet been decided by this Court. See USSCR 17.1(c). Contrary to Sparks' general assertion (Petition at 4), he raises no important, undecided federal questions in his petition. He simply argues that judicial immunity does not apply to those who do not "hear cases, render written opinions, conduct trials, set bail, set bonds, or impose sentencing." Petition at 12. Unfortunately for him, however, this Court in *Briscoe* v. *Lahue*, 460 U.S. 325 (1983) and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), has already decided that judicial immunity extends beyond judges. As this Court emphasized in *Forrester* v. *White*, 484 U.S. —, 98 L. Ed. 2d 555, the performance of judicial functions is entitled to judicial immunity. The Respondents, as designees of the Kentucky Supreme Court, were performing judicial functions in determining the composition of the bar and are entitled to absolute immunity.

CONCLUSION

The Petition fails to state a single special or important reason for the Court to hear this case. In addition, the Sixth Circuit's decision is consistent with and supported by *Forrester* v. *White,* 484 U.S. —, 98 L. Ed. 2d 555 (1988), and other case law in this Court and other federal appellate courts. Respondents, therefore, respectfully request that this Court deny Sparks' petition.

Respectfully submitted,

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APPENDIX

No. 85-5629

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GERALD M. SPARKS, - - - *Plaintiff-Appellant,*

v.

CHARACTER AND FITNESS COMMITTEE OF KENTUCKY, et al., - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed October 18, 1988

Before: ENGEL, Chief Judge;* KRUPANSKY and RYAN, Circuit Judges.

RYAN, Circuit Judge. This case has been returned to us by the United States Supreme Court which vacated our earlier judgment and directed that we give the matter "further consideration" in light of *Forrester* v. *White,* 484 U.S. __; 98 L. Ed. 2d 757 (1988). We have done so and now hold that the Supreme Court's opinion in *Forrester* is entirely distinguishable from this case and, therefore, does not require that we change our previous decision. *See Sparks* v. *Character & Fitness Comm.,* 818 F. 2d 541 (6th Cir. 1987). Accordingly, we once again affirm the district court's dismissal of plaintiff's complaint.

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

I.

Plaintiff Sparks filed a complaint in the district court on March 1, 1985 against the chief justice of the Kentucky Supreme Court, a member of the Board of Law Examiners, the Kentucky Character and Fitness Committee, its members, and two of its employees. The complaint alleged violations of various constitutional rights pursuant to 42 U.S.C. § 1983, and asserted several state law claims arising out of the Kentucky Supreme Court's refusal to admit Sparks to membership in the bar of the state of Kentucky.

In our earlier decision, we described the factual background for Sparks' lawsuit as follows:

> Sparks averred that in 1980, when he was first a candidate for admission to the Kentucky bar, he was interviewed, pursuant to Kentucky Supreme Court Rule 2.040, by Junius J. Beaver, Jr., an associate member of the [Kentucky Character and Fitness] Committee. At the conclusion of the interview, Mr. Beaver addressed a letter to the Kentucky State Board of Bar Examiners stating that because Sparks was not possessed of the requisite character and moral fitness, he could not recommend that Sparks take the upcoming Kentucky Bar Examination.
>
> Sparks contends that despite Mr. Beaver's adverse recommendation, of which Sparks had no knowledge, "the powers that be still allowed him to take the Kentucky Bar exam four times . . . knowing full well that the plaintiff had been blackballed." Sparks failed the bar examination three times; his fourth examination was never graded.

818 F. 2d at 542.

The district court dismissed the action against the Honorable Robert F. Stephens, Chief Justice of the Kentucky

Supreme Court, on the ground that Chief Justice Stephens was entitled to absolute immunity because consideration of an application for admission to the bar is a judicial act for which a judge cannot be held liable in damages. The district court also dismissed the action against the remaining defendants, holding that given the extensive authority exercised over the Board of Bar Examiners and the Character and Fitness Committee by the Kentucky Supreme Court, the actions of the Board of Bar Examiners and the Committee relating to Sparks' application for admission to the bar "cannot be divorced from the actions of the Supreme Court of Kentucky" and are also "clothed with judicial immunity." The district court therefore dismissed plaintiff's complaint.

On appeal, we affirmed the district court's holding. 818 F. 2d 541 (6th Cir. 1987). After noting, *inter alia,* that the Kentucky Constitution charges the Kentucky Supreme Court with the duty to "govern admission to the bar and the discipline of members of the bar," Ky. Const. of 1891, § 116 (1976), we held that "the act of considering an application for admission to the bar, particularly when that duty is imposed upon the judiciary by constitution, is a judicial act. When it is performed by a judge, he or she is entitled to absolute judicial immunity." 818 F. 2d at 543. Our reasoning, in part, was as follows:

> In [*Stump* v.] *Sparkman* [435 U.S. 333, 342 (1978)], the Supreme Court stated:
>
> > "The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they deal with the judge in his judicial

capacity."

. . . .

The power to determine who should practice before the courts has been aptly summarized by Chief Justice Taney:

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

Ex parte Secombe, 60 U.S. (19 How.) 9, 13 (1856). This power is not only exclusive; it is inherently judicial. *Simons* v. *Bellinger,* 643 F. 2d 774, 780 (D.C. Cir. 1980). *Accord Louis* v. *Supreme Court of Nevada,* 490 F. Supp. 1174, 1182 (D.Nev. 1980); *Galahad* v. *Weinshienk,* 555 F. Supp. 1201, 1204 (D. Colo. 1983).

. . . .

> The court's exercise of its inherent power to choose its officers is substantially determinative of the character and quality of our entire judicial system, state and federal. Our system of justice depends, in substantial measure, upon the service of competent and qualified attorneys. The decision whether to admit or deny an applicant admission to the bar, and thus to determine the composition and quality of the bar, affects both the quality of justice in our courts and the public's perception of that quality. The decision is therefore integral to the very essence of the judicial process.

818 F. 2d at 542-43. We therefore affirmed the district court's dismissal of the plaintiff's complaint against the chief justice of the Kentucky Supreme Court, *Id.* at 543.

We then addressed the question whether the remaining defendants, who are not judges, nevertheless enjoy immunity for their activities with regard to plaintiff's application for admission to the Kentucky bar. We explained in some detail that since the "nonjudicial" defendants were acting pursuant to a command imposed upon them by the Kentucky Supreme Court under a provision of the Kentucky Constitution, their actions, at the very least, were quasi-judicial and, that being so, they were entitled to absolute immunity as well. We stated, in part:

> Public policy requires "absolute immunity . . . for all persons — governmental or otherwise — who [are] integral parts of the judicial process." *Briscoe* v. *LaHue*, 460 U.S. 325, 335 (1983). In *Campbell* [v. *Patterson*, 724 F. 2d 41, 43 (6th Cir. 1983)], we held that Michigan's Attorney General, obligated by statute to perform duties of a quasi-judicial nature, enjoys absolute immunity even when the action taken is erroneous.
>
> A survey of the case law reveals that public policy requires absolute immunity for public officials performing quasi-judicial functions in a number of circumstances. It has been granted to members of an attorney disciplinary committee, *Simons*, 643 F. 2d at 780; to a state bar association conducting disciplinary proceedings, *Clark* v. *State of Washington*, 366 F. 2d 678 (9th Cir. 1966); to lawyers serving on a mediation panel, *Mills* v. *Killebrew*, 765 F. 2d 69 (6th Cir. 1985); to the court's clerk for acts within the scope of his quasi-judicial duties, *Denman* v. *Leedy*, 479 F. 2d 1097 (6th Cir. 1973); to "friends of the court," *Johnson* v. *Granholm*, 662 F. 2d 449 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982); and to prosecutors engaging in

prosecutorial activity, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

. . . .

In *Hoover* [v. *Ronwin*, 466 U.S. 558 (1984)], the plaintiffs, who had failed the Arizona Bar Examination, brought suit against the members of the Arizona Supreme Court Committee on Examinations and Admissions, alleging that the committee members had conspired to restrain trade in violation of the Sherman Act by artificially reducing the number of competing attorneys in Arizona. The Supreme Court determined that the actions of the committee members, in using a grading formula to determine admissions to the bar, could not be divorced from the actions of the Arizona Supreme Court. The Court noted that the members were appointed by the supreme court and the court "retained strict supervisory powers and ultimate full authority over its actions." 466 *Id.* at 572. The Court concluded that the conduct challenged was "in reality that of the Arizona Supreme Court," and therefore, the committee members were absolutely immune from anti-trust liability under the doctrine of sovereign immunity announced in *Parker* v. *Brown*, 317 U.S. 341 (1943). *Hoover*, 466 U.S. at 573.

Similarly, in the *Simons* case, two attorneys sued the members of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law. They alleged that the defendants maliciously harassed them during an illegal investigation of their law practice. The court concluded that the committee members' work was "functionally comparable to the work of judges . . . they serve as an arm of the court and perform a function which traditionally belongs to the judiciary." 643 F. 2d at 781.

> The acts complained of in this case were performed by the defendants in obedience to duties imposed upon them by the Kentucky Supreme Court which is charged under the Kentucky Constitution with the obligation to enact rules "govern[ing] admission to the bar and discipline of members of the bar." In response to this constitutional command, the Kentucky Supreme Court adopted Supreme Court Rule 2.000 creating the Board of Bar Examiners and describing its duties, and Rule 2.040 creating the Committee on Character and Fitness, determining its composition, and defining its duties. These rules require, in sum, that the respective committees, their members and staff personnel, act on behalf of the Kentucky Supreme Court in administering procedures for admission to the bar of Kentucky and in determining the character and fitness of applicants as a condition precedent to the admission. In executing these duties, the committee members and staff personnel act under the direct supervision of the Kentucky Supreme Court and in its name. Their activities cannot be separated from the actions of the Supreme Court of Kentucky. The actions of the defendants in this are, therefore, not only "functionally comparable" to judicial duties, they are the functional equivalent."

Id. at 543-44. We concluded that:

> The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform those duties on behalf of the judiciary are entitled to the same immunity as would be enjoyed by judicial officers performing the same act.

Id. at 544-45. We determined, in other words, that whether a function is a judicial act is determined by the nature of the function, not the office of the actor.

In obedience to the Supreme Court's order, we now reconsider our decision in light of *Forrester*.

II.

In *Forrester*, plaintiff brought a 42 U.S.C. § 1983 action against a state court judge, alleging that she was demoted and later discharged from her position as a probation officer because of her sex, in violation of the Equal Protection Clause of the fourteenth amendment. Under Illinois law, the defendant judge had authority to hire and fire such officers at his discretion. The Supreme Court held that the judge was not protected from liability by absolute judicial immunity because it was "clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester." 98 L. Ed. 2d at 566. In reaching this holding, the Court observed:

> When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.
>
> This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, sug-

> gest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. *See Stump* v. *Sparkman,* 435 U.S. 349, 363 n. 12 (1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive.

Id. at 565 (*quoting Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 354 (1871)) (emphasis in original).

Thus, the Court in *Forrester* made clear that only "judicial acts" are protected by judicial immunity, and that administrative decisions, although "often crucial to the efficient operation of public institutions," such as the courts, are not protected by absolute immunity. 98 L. Ed. 2d at 566. Judicial immunity has not been granted to judges promulgating a code of conduct for attorneys. *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.,* 446 U.S. 719 (1980). Similarly, "judges acting to enforce the bar code would be treated like prosecutors, and then would be amenable to suit for injunctive and declaratory relief." *Id.* at 734-37.

In *Forrester,* Justice O'Connor explained that the analytical key "in attempting to draw the line" between functions for which judicial immunity attaches and those for which it does not is the determination whether the questioned activities are "truly judicial acts" or "acts that simply happen to have been done by judges." It is the

nature of the function involved that determines whether an act is "truly" judicial.

The question then is whether an "administrative" decision to hire or fire a court staff employee, action not essentially "judicial," as in *Forrester*, is the functional equivalent of the action of the justices of a state supreme court and their designees in considering the qualifications of an applicant for admission to the bar as in this case.

A careful examination of the *Forrester* and *Consumers Union* cases reveals that the nature of the function involved in determining qualifications for admission to the bar on the one hand, and hiring and firing court staff personnel or enforcing a bar code on the other, are essentially different. The former is a judicial act, the latter two are not.

As *Forrester* holds, hiring and firing administrative court staff personnel are functions that merely happen to be performed by some judges. Indeed, they are functions ordinarily performed by nonjudicial employers and, when judges perform them, the actor is different but the nature of the action is not. In many courts, the employment decisions for court staffing purposes are made by nonjudicial court personnel. There is, as the Court held in *Forrester*, nothing functionally or historically "judicial" about hiring or firing staff members. The same cannot be said for the historically judicial function of determining eligibility for, and the composition of, the state bar.

The language of *Forrester* itself, to say nothing of the very different facts involved there, suggests at least three separate reasons why the actions taken in this case by the Kentucky Supreme Court and its Committee on Character and Fitness are "judicial acts." First, in *Forrester*, the Supreme Court cited the availability of an appeal process as a central reason for granting judicial immunity to judges for their judicial acts: "Nor are suits against judges the

only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effect inevitably associated with exposing judges to personal liability." *Forrester,* 98 L. Ed. 2d at 565. Kentucky Supreme Court Rule 2.060 provides applicants to the Kentucky bar with an avenue of appeal on the record from adverse decisions by the Committee on Character and Fitness:

> The decision of the Character and Fitness Committee as to the eligibility of an applicant for admission to the bar of this state shall be final unless, on motion by the applicant filed within sixty days after notice of an adverse decision has been mailed to his last known address, the Supreme Court upon *review of the record* overrules such decision.

(emphasis added).

Supreme Court review on the record of an adverse decision "as to the eligibility of the applicant for admission to the bar," initiated "on motion," describes a process of appellate review of possible "judicial mistakes or wrongs" that has no counterpart in the review of the inherently administrative function of hiring and firing court staff personnel.

Second, the *Forrester* Court quoted, with approval, from the decision in *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871), according immunity to the judicial disbarment of an attorney. The *Bradley* Court observed that acting to disbar an attorney invokes a power "possessed by all courts which have authority to admit attorneys to practice. . . ." 80 U.S. (13 Wall.) at 354. If the action of a court in disbarring an attorney is a judicial act for which immunity

attaches, in part, because it "invokes a power possessed by all courts which have authority to admit attorneys to practice," it follows inexorably that in exercising the power it has to determine who shall be admitted to practice, the Kentucky Supreme Court performs a judicial act for which immunity attaches. And if, as the *Forrester* Court observed, it is the nature of the function performed which determines the judicial character of an act and not "the character of the agent," it is of no moment that the actor is a designee of the justices of the Kentucky Supreme Court rather than the justices themselves. "Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." 98 L. Ed. 2d at 565 (emphasis in original).

Finally, the power to determine eligibility for membership in the bar has historically been reposed exclusively in the courts. *See Ex parte Secombe, supra; Simons* v. *Bellinger, supra.* That is not to say that "because a judge acts within the scope of his authority, such . . . decisions are brought within the court's 'jurisdiction' or converted into 'judicial acts'. . . ." *Forrester,* 9 L. Ed. 2d at 567. Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a function confined to the courts themselves. It has been universally thought that the courts are best equipped to understand the requirements for adequate representation of lay persons before the courts and to identify the qualifications of those who would undertake such representation

as the courts' officers. That inherent expertise, and the exercise of the power to apply it in admitting and rejecting candidates to the practice of law, functions rooted in tradition and history, are arguably as fundamental to the sound functioning of the judiciary as is the task of resolving the disputes such officers present.

We return, then, to the analytical key provided by Justice O'Connor in *Forrester* for "drawing the line" between functions for which judicial immunity attaches and those for which it does not: whether the function in question is a "truly judicial act[]" or an "act[] that simply happen[s] to have been done by judges." Whatever argument might be made about the inherently "judicial" character of the function of determining the membership of the bar, it is manifest that whether analyzed from the perspective of judicial precedent, judicial expertise, history and tradition, or the nature of the act itself, determining the composition of the bar is clearly not a function, like hiring and firing administrative, clerical, and other court personnel that is or ever has been performed by anyone in the private sector or in other branches of government, and "simply happen[s] to have been done by judges."

III.

For the foregoing reasons, and those set forth in *Sparks, supra*, we hold that the actions taken by the Kentucky Supreme Court and the Committee on Character and Fitness, and its members, were "judicial acts" to which absolute immunity attached. Having carefully reconsidered our previous decision to that effect in light of the Supreme Court's decision in *Forrester*, we conclude that the district court's dismissal of Sparks' complaint must be AFFIRMED.

No. 87-275. Gerald M. Sparks, Petitioner v. Character and Fitness Committee of Kentucky, et al.

January 19, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Forrester v. White, 484 U.S. — 98 L. Ed. 2d 555, 108 S. Ct. — (1988).

Same case below, 818 F. 2d 541.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 85-209

GERALD M. SPARKS, - - - - - *Plaintiff,*

v.

KENTUCKY CHARACTER AND FITNESS COMMITTEE, Et Al., - - - - *Defendant.*

MEMORANDUM OPINION—Entered June 25, 1985

This matter is before the court on the motion to dismiss of defendants Kentucky Character and Fitness Committee, Junius J. Beaver, Jr., Thomas P. Bell, Grant M. Helman, William J. Baird III, Stuart E. Lampe, and Pat Gill. They claim that the court lacks jurisdiction over the action because all of the defendants are protected by judicial immunity, that the complaint fails to state a claim upon which relief can be granted, and that plaintiff's complaint is in violation of Rule 8(a) of the Federal Rules of Civil Procedure and therefore, should be dismissed.

Plaintiff Gerald M. Sparks brings this suit *pro se* and *in forma pauperas* (sic) under 42 U.S.C. § 1983. He alleges tht defendants, members and employees of the Kentucky Character and Fitness Committee and the Kentucky Board of Bar Examiners, prevented him from passing the Kentucky Bar examination in violation of his 8th, 5th, and 14th amendment constitutional rights. Specifically, Sparks contends that in 1980 Beaver placed a letter in his bar application file stating that he did not recommend Sparks to be admitted to the bar. Despite that letter, the Board per-

mitted Sparks to take the bar examination four times. He failed three of those examinations. The fourth was never graded. Thus, Sparks argues, the Committee unconstitutionally defrauded him by taking his application and examination fees knowing that it would never recommend him to the bar.

Without ruling on the other two contentions of the defendants, the court finds that the defendants are immune from suit. Thus, it shall grant their motion to dismiss. On April 17, 1985, this court entered an order dismissing plaintiff's claims against Chief Justice Robert F. Stephens. The court found that Stephens was protected by the doctrine of judicial immunity because consideration of an application for admission to the bar is judicial in nature and judges are absolutely immune from liability for damages for their judicial acts. *See Louis* v. *Supreme Court of Nevada*, 490 F. Supp. 1174, 1181 (D. Nev. 1980); *Gallahad* v. *Weinshienk*, 555 F. Supp. 1201 (D. Colo. 1983). It follows from that decision that the same acts performed by an arm of the Kentucky Supreme Court retain their judicial nature as well as their immunity.

In the recent Supreme Court decision *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S. Ct. 1989 (1984), the Court held that actions of the Arizona Supreme Court's Committee on Examinations and Admissions and Board of Bar Examiners relating to the grading of the bar examination could not be divorced from the Arizona Supreme Court's exercise of its power. Although that decision dealt with the Committee's liability under the Sherman Act, the Court's discussion of the relationship between the Committee and Board, and the state Supreme Court is equally applicable here.

The Kentucky Supreme Court has extensive authority over the Board of Bar Examiners and the Character and Fitness Committee. Their members are appointed by the

Supreme Court and the Court must approve the rules and regulations promulgated by those members. *Supreme Court Rules* 2.000 & 2.040. In addition, the court directs which subjects are to be tested and the minimum score needed to pass the examination. *Supreme Court Rule* 2.090. Finally, the court retains the final authority to determine who will be admitted to practice law in the State. *Supreme Court Rule* 2.060. Just as in the *Hoover* case, the actions of the Committee and Board which concern consideration of an application for admission to the bar cannot be divorced from the actions of the Supreme Court of Kentucky. Hence, those actions are clothed with judicial immunity.

Sparks' allegations concern improper consideration of his application for admission to the bar. For the reasons heretofore set forth those alleged acts are judicial in nature and the defendants are therefore, immune from suit. Accordingly, this court does not have jurisdiction to hear Spark's claim, and his complaint shall be dismissed.

An order of dismissal is this day entered.

DATED: June 24, 1985

(s) Edw. Johnstone
Edward H. Johnstone, Judge
United States Court

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

KENTUCKY CONSTITUTION § 116

The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

RELEVANT SECTIONS OF UNITED STATES SUPREME COURT RULES

Rule 17. Considerations Governing Review of Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * * * * * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

RELEVANT SECTIONS OF THE KENTUCKY SUPREME COURT RULES

Rule 2. Admission of Persons to Practice Law

Rule 2.000 Board of Bar Examiners

(1) There is hereby created a Board of Examiners known and designated as Kentucky Board of Bar Examiners, hereinafter referred to as "Board." The Board shall be composed of three attorneys appointed by the Supreme Court of Kentucky for terms of three years, the members to serve until the expiration of their terms and until their successors are appointed. The Board shall select from its membership a chairman and a secretary.

(2) Subject to the approval of the Supreme Court, the Board shall have the power to adopt and amend rules and regulations governing the manner in which it carries out its duties.

(3) The Board is charged with the responsibility of administering the bar examination to qualified applicants for admission to the bar of the Commonwealth.

Rule 2.040 Character and Fitness Committee Nominations

(1) There is hereby created a Committee on Character and Fitness, to be composed of three attorneys, appointed by the Supreme Court for terms of three years, the members to serve until the expiration of their terms and until their successors are appointed. The Character and Fitness Committee shall select from its membership a chairman.

(2) Subject to the approval of the Supreme Court, the committee shall have the power to adopt and amend rules and regulations governing the manner in which it carries out its duties. The Character and Fitness Committee may

appoint from the bar of the state associate members of the Character and Fitness Committee.

(3) The Committee on Character and Fitness is charged with the responsibility of determining the age, character and fitness, education and general qualifications of those applicants for admission to the bar of the Commonwealth whose applications are referred to it by the Clerk of the Supreme Court. The Character and Fitness Committee further shall be authorized to render advisory opinions, based on fact situations submitted to it in writing as to whether a person who has the academic qualifications for admission to a law school approved by the American Bar Association or the American Associaton of Law Schools would be eligible for admission to the bar of the Commonwealth from the standpoint of character. The Character and Fitness Committee is further charged with the duty of certifying to the Supreme Court persons who appear qualified to perform legal services as interns under Rule 2.540.

Rule 2.060 Committee's Decision as to Eligibility

The decision of the Character and Fitness Committee as to the eligibility of an applicant for admission to the Bar of this State shall be final unless, on motion by the applicant filed within 60 days after notice of an adverse decision has been mailed to his last known address, the Supreme Court upon review of the record overrules such decision.